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In The

Supreme Court of the United States

October Term, 1984

JOHN MITCHELL,

Petitioner,

vs.

KEITH FORSYTH

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

1. The district court's order denying petitioner's summary judgment motion is clearly not a "final decision" 28 U.S.C. § 1291. Therefore, this Court has jurisdiction only if the "collateral order doctrine" is appropriately invoked. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The final judgment rule—that a party may not appeal under 28 U.S.C. § 1291 until the district court litigation is concluded on the merits—"is an historic characteristic of federal appellate jurisdiction." *Flanagan v. United States,* — U.S. —, 79 L.Ed.2d 288, 293 (1984), quoting *Cobb'edick v. United States,* 309 U.S. 323 (1940). It represents the "firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." *Abney v. United States,* 431 U.S. 651 (1977).

There is a "narrow exception," permitting interlocutory appeals in a "small class" of cases in which an order, though technically not final, nonetheless is sufficiently collateral as to be effectively "unreviewable" on appeal from the final judgment. *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374 (1981); *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978). But the so-called collateral order doctrine cannot be applied to the qualified immunity defense except by disregarding the reasons justifying that limited exception, and ignoring the Supreme Court's direction that the exception be kept limited.

Qualified immunity does not share the attributes that warrant applying the collateral order doctrine to absolute immunity claims. Indeed, the very different meanings of the adjectives that modify, and thus define the two immunities—"absolute" and "qualified"—point to the critical conceptual and practical distinctions that render the former properly subject to appeal, and the latter not.

In our legal system an immunity is deemed "absolute" only because in certain rare circumstances the overriding interests of society at large are best served by protecting the beneficiary of that immunity from being civilly

held accountable for wrongdoing. However, an immunity that is merely conditional, or "qualified," necessarily reflects the far more common judgment that, even though the defendant is a government official, society's interests can tolerate adherence to the general rule demanding that a person account for his or her misdeeds, though in some instances the defendant should be shielded from ultimate liability by a defense of good faith. Thus, an "absolute immunity" claim *must* be reviewed on appeal before trial if it is to have its intended effect, because it is meant to provide an absolute protection against that very trial. Such immediate review is not necessary—and therefore should not be permitted—to preserve the integrity of "qualified immunity" because it is only an affirmative defense against liability and, like all such defenses, is satisfactorily protected by appellate review after final judgment.

In the very first case in which this Court applied the collateral order doctrine to an absolute immunity claim, the defendant was asserting rights protected by the Double Jeopardy Clause of the Fifth Amendment—which the Court described as "a guarantee against being twice put to *trial* for the same offense." *Abney v. United States, supra* at 661 (emphasis in original). In other words, the defendant was "contesting the very authority of the Government to hale him into court to face trial." *Id.*, at 659. That claim would necessarily be irreparably lost—in the words of the Supreme Court, "effectively unreviewable," *Coopers & Lybrand v. Livesay, supra,* at 468 —if the defendant had to wait until after trial for appellate review of the immunity that was meant to shield him from the trial itself. 431 U.S. at 662. See also *Helstoski*

v. Meanor, 442 U.S. 500 (1979); *Nixon v. Fitzgerald,* 457 U.S. 731 (1982). Qualified immunity, by its nature being just a *conditional* protection against liability, is like any other affirmative defense—such as the statute of limitations, res judicata, or lack of jurisdiction— which may be absolute and dispositive if successfully urged by a moving party, but which must await final judgment for appeal even if wrongly decided by the district court.

The very first limitation the Supreme Court imposed on the collateral order doctrine is that it apply only to a "small class of interlocutory orders." *Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982). However, because the same qualified immunity defense raised in this case is also asserted by virtually every defendant in civil rights cases, the class of qualified immunity cases is anything but small.[1] By comparison, cases involving Double Jeopardy Clause immunity, *Abney v. United States, supra,* or Speech or Debate Clause immunity, *Helstoski v. Meanor, supra,* or Presidential immunity, *Nixon v. Fitzgerald, supra,* are rare indeed.

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[1]The latest available statistics compiled by the United States Judicial Conference reveal that in the 12 month period ending June 30, 1983 there were 4,418 civil rights cases (including prisoner cases) filed in the district courts of this Circuit alone. 1983 *Reports of the Proceedings of the Judicial Conference of the United States [and the] Annual Report of the Director of the Administrative Office of the United States Courts,* Table C-3, "United States District Courts Civil Cases Commenced, By Nature of Suit and District As of June 30, 1983" at 248.

Not only will the qualified immunity defense be raised in most of those cases, but it can be expected to arise as well in an unknown number of cases filed in categories other than "civil rights" in which government officials are defendants.

The position urged by petitioner would permit immediate appellate review every time a district court denied any official defendant a qualified immunity defense. And it is virtually certain that the defendant who is permitted to appeal will do so, because there is nothing to lose. Even if the appeal is unsuccessful on the merits, the defendant will have successfully delayed the trial court proceedings, and the plaintiff will have suffered "the obstruction to just claims . . . the harassment and cost" of the interlocutory appeal. *Firestone Tire & Rubber Co. v. Risjord, supra* at 374.

As recently recognized by the Third Circuit in *refusing* to extend the collateral order doctrine to the qualified immunity defense:

> "The pages of current legal publications are replete with justified concern about the crushing burden under which the courts of appeals are operating. [We] fear that the decision of the panel today to allow this appeal under the mantle of the *Cohen* collateral doctrine order and to deny the motion to dismiss [would] open the suices to a flood of interlocutory appeals crushing us even further under a weight of our own making." *Forsyth v. Kleindienst,* 729 F.2d at 274, quoting *Forsyth v. Kleindienst,* 700 F.2d 104, 110 (3rd Cir. 1983) (Opinion Sur Grant of Stay) (Sloviter, J., dissenting).

Morever that "crushing" impact on the appellate docket is almcst entirely avoidable, since in most cases a denial of qualified immunity will never reach a court for review, but rather will be incorporated into other resolutions of the case before appeal (e.g. settlement, defendants' success

on other dispositive motions, judgment for defendants on the merits).[2]

The procedural setting of this case also counsels against allowing an interlocutory appeal. This is *not* a case where the interlocutory appeal will save either pretrial or trial time. Discovery was completed several years ago and summary judgment has been entered for plaintiff. The only issue left for consideration is that of damages. Accordingly, none of the purposes that are allegedly served by allowance of interlocutory appeals are even present in this case.

Furthermore, respondent also presents a statutory claim for damages under 18 U.S.C. § 2520, which is not subject to interlocutory review, and must still be decided by the District Court. No qualified immunity attaches to this claim since the good faith defense allowed by the statute at the time of this surveillance was limited to reliance on a court order or emergency, neither of which is present in this case. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (no common law good faith defense to Title VII claim).[3]

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[2]We do not contest petitioner's claim that there is a conflict in the circuits on this issue.

[3]18 U.S.C. § 2520 provided "a good faith reliance on a court order or on the provisions of section 2518(7) of this chapter [governing emergency powers] shall constitute a complete defense to any civil or criminal action brought under this chapter."

The statute was amended, effectively February 1, 1971: A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

2. Petitioner is not entitled to qualified immunity.[4] Initially, it should be noted that the merits of the qualified immunity defense were not addressed by the Court of Appeals. Even if this Court were to rule that this matter can be appealed on an interlocutory basis, the merits of the claim should first be addressed by the court below.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) this Court cautioned that its holding would:

> . . . provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts."

In this case, respondent relies on a cardinal principle of our constitutional system: that a government official may not conduct searches and seizures without prior judicial approval except in limited, specifically designated exigent circumstances. If an exception to the warrant requirement has not been articulated, the Fourth Amendment requires a warrant before a person's privacy can be invaded. See *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971). The Supreme Court's construction of the Fourth Amendment gave petitioner no basis to believe that his actions in this case were lawful.

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[4]As a threshold matter there is a substantial question as to whether the wiretaps in this case were predicated on national security grounds. The district court found it unnecessary to decide this issue. App. 59a. Since the failure to prove a legitimate national security basis for the surveillance would establish liability under 18 U.S.C. § 2520 and the Fourth Amendment, *Smith v. Nixon*, 606 F.2d 1183, 1188 (D.C. Cir. 1979); *United States v. United States District Court, supra*, 407 U.S. at 780 (White, J., concurring), this petition is premature.

Katz v. United States, 389 U.S. 347 (1967), "clearly established" the right of the respondent in this case to be free from "[s]earches conducted outside the judicial process, without prior approval of a judge or magistrate." 389 U.S. at 357. A footnote in *Katz* reserved one area for future decision (389 U.S. at 358, n.23):

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

It is important to note that *Katz* was unequivocal in its statement of established Fourth Amendment jurisprudence: all searches must receive prior judicial approval except for limited, specifically stated exceptions to the warrant requirement. *Katz* did not announce a national security exception; therefore, the Fourth Amendment clearly established the need for such a warrant in this kind of case, until the Court specifically recognized a "national security" exception. Because the Fourth Amendment warrant requirement is presumed to apply unless a clear exception excuses compliance, and because no exception for national security cases was established when petitioner acted, the law to which he was subject was "clearly established."

Furthermore, whatever basis there was to believe that "national security" taps were not subject to the warrant requirement, was limited to *foreign* intelligence surveillance. In *Alderman v. United States,* 394 U.S. 165 (1969), Justice Harlan limited national security cases to those "in which the defendant is charged . . . with spying for a foreign power." Specifically, Justice Harlan was concerned with "espionage case[s]"—*i.e.,* where the defend-

ant has passed secrets to a foreign power. 394 U.S. at 198. Justice Fortas characterized "national security material" as a "rigid and limited" category, including only activities "specifically directed to acts of sabotage, espionage, and aggression by or on behalf of foreign states." 34 U.S. at 209.

Justice Stewart's concurrence in *Giordiano v. United States,* 394 U.S. 310, 313 (1969), further indicated the limited nature of the issue on which decision was reserved in *Katz.* Terming the putative exception as one relating to the "gathering of foreign intelligence information," Justice Stewart noted the necessity of protecting "national defense secrets and installations from foreign espionage and sabotage." 394 U.S. at 314. Of course, all of these definitions encompass saboteurs and spies, not domestic political groups.[5] Nor can petitioner draw support from district court rulings. Both *United States v. Stone,* 305 F.Supp. 75 (D.D.C. 1969) and *United States v. O'Baugh,* 304 F.Supp. 767 (D.D.C. 1969) involved *foreign intelligence* wiretaps installed *before* the 1967 Opinion in *Katz.*

In April, 1969, the Solocitor General advised petitioner that a wiretap of an individual or organization which had no foreign intelligence information and which was not necessary for the protection of national defense secrets and installations from foreign espionage and sabotage was indefensible under the Supreme Court's rulings.

It could be argued that such power extends to the protection of the national security from internal subver-

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[5]Justices Douglas and Brennan were of the view that there was *no* national security exception under the Fourth Amendment's warrant requirement. *Katz, supra* at 359-360.

> sion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the [deleted] or other subversive organizations. *I believe, however, that any attempt to sustain such surveillance would be disastrous. Not only would we not prevail on the particular facts presented* but I believe we would get a broad ruling that all electronic surveillance is unconstitutional if conducted without a warrant. (Emphasis added).

Under these circumstances, no qualified immunity can be claimed by respondent.

3. Petitioner is not entitled to absolute immunity.[6] In *Harlow,* the Court rejected the claim made by chief aides of the President that they were entitled to derivative Presidential immunity. The Court stated at 2734:

> If the President's aides are derivatively immune because essential to the functioning of the Presidency, so should be members of the Cabinet—Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself—be absolutely immune. Yet we implicity rejected such derivative immunity in *Butz.*

The Court "assumed" that some Presidential aides could be assigned to act as Presidential "alter-egos," but only in those rare situations where the "exercise of functions for which absolute immunity is '*essential* for the conduct of the public business . . .'" *Id.,* at 2735, n. 19. (Emphasis added). Petitioner's claim to immunity under

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[6]On appeal from the denial of petitioner's first motion for summary judgment, the Court of Appeals concluded that he was not entitled to absolute immunity under *Butz v. Economou,* and this Court denied a petition for writ of certiorari raising the same issue now sought to be raised by petitioner. 452 U.S. 713 (1981).

this dictum is no less undifferentiated than his claim to derivative immunity. The Attorney General has a wide variety of important duties and responsibilities but, absent a showing that they involve a quasi-judicial function, they are not grounds for absolute immunity. Currently, of course, there is absolutely no question but that the warrantless surveillances conducted by petitioner are illegal. *United States v. United States District Court,* 407 U.S. 297 (1972) ("Keith"); Title III, 18 U.S.C. §§ 2510-2520; Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801, 1810. Thus, if his claim is upheld, high governmental officials could with absolute immunity engage in unlawful warrantless surveillances. The *Butz* and *Harlow* emphasis on "public policy," *Harlow, supra* at 2736 n.20, can hardly support such a result.

In *Butz v. Economou, supra* at 505-06, the Court stated:

> The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct projects—including some which may infringe such important personal interests as liberty, property, and free speech . . . Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

Petitioner attempts to draw an analogy between the Attorney General's authorization of domestic security surveillances and Presidential decision-making and judgments

in highly sensitive areas of military policy and foreign affairs. Whatever force that argument would have if this case presented the entirely different question of a Governmental official acting under direct delegation of power to decide important foreign policy or military matters, it is simply of no consequence in this case where the issue is the decision to forego the Fourth Amendment's warrant requirement in a wholly domestic investigation.

The attempt to broaden the Executive's prerogatives in the military/foreign affairs area to include all "national security" matters was emphatically repudiated in *Keith*. *Keith* mandates close judicial scrutiny of Executive decision-making in this area and by its explicit terms forecloses the claim to absolute immunity.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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